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Supreme Court of the United States

October Term, 1975
No. 75-1359

DEMOCRATIC EXECUTIVE COMMITTEE
OF COLUMBIANA COUNTY, *et al.*,
Petitioners,

vs.

TED W. BROWN, SECRETARY OF STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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vs.

TED W. BROWN, SECRETARY OF STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Democratic Executive Committee of Columbiana County, Ohio and Don R. Gosney, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 20, 1976.

OPINION BELOW

This is an appeal from an order of the United States Court of Appeals for the Sixth Circuit in Case No. 75-2156 dated January 20, 1976. The unreported order is set out in the appendix.

JURISDICTION

The order of the Sixth Circuit Court of Appeals (Appendix, *infra*, page A1) was entered on January 20, 1976. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

This is an appeal from a decision of a Federal Court of Appeals upholding a decision of a three-judge court in the Federal District Court, Northern District of Ohio, Eastern Division, declaring that the claims for relief of the petitioners Democratic Executive Committee of Columbiana County and/or the petitioner Don R. Gosney are barred by the doctrine of res judicata. The decision of the court came on a motion to affirm under Rule 8 of the Rules of the Sixth Circuit Court of Appeals.

QUESTIONS PRESENTED

I.

Did the United States Court of Appeals err in invoking the doctrine of res judicata and declaring that the judgment of the Ohio Supreme Court in the case of *State ex rel. Democratic Executive Committee v. Brown,* 39 Ohio St. 2d 157 (1974) was a bar to the claims of the petitioner Democratic Executive Committee in this case?

II.

Did the United States Court of Appeals err in declaring that petitioner Don R. Gosney was in privity with the Democratic Executive Committee and thus the doctrine of res judicata did apply?

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III.

Did the United States Court of Appeals correctly rely on, and interpret the case of *Coogan v. Cincinnati Bar Association,* 431 F.2d 1209 (1970)?

IV.

Did the United States Court of Appeals err in not declaring that Revised Code Section 3501.07 is unconstitutional?

STATUTORY PROVISION IN QUESTION

The portion of Ohio's election statute, which is involved in the decision, appears in the appendix hereto wherein the entire statute, Ohio Revised Code Section 3501.07, is reproduced at page A12.

FACTS PERTINENT TO THIS CASE

In 1951 petitioner Don R. Gosney was appointed to the Board of Elections of Columbiana County, Ohio; and he served in this capacity by successive recommendations of the Democratic Executive Committee of Columbiana County, Ohio and appointments by the respondent Secretary of State of Ohio through the appointment of February 1970 for a four-year term expiring March 1, 1974.

During his entire service on said Board of Elections petitioner Don R. Gosney has been employed by Congressman Wayne Hays as a member of his staff.

After a regular meeting following proper procedure the Democratic Executive Committee of Columbiana County did in a written communication to respondent Secretary of State recommend Don R. Gosney for reappoint-

ment to said Board of Elections for a new four year term commencing March 1, 1974; and by letter dated February 5, 1974 said respondent Secretary of State refused to reappoint petitioner Gosney for the sole reason that "you are employed by Congressman Wayne Hays" and "the two positions (member of Board of Elections and employment with Congressman Hays) have the potential for conflict of interest."

No written charges were made or served upon petitioner Gosney or the petitioner Democratic Executive Committee by the respondent, Secretary of State, no complaint was filed by respondent, and no hearing was ever held by respondent Secretary of State affording petitioner or either of them an opportunity to appear and meet any charges which respondent had or might make against petitioner Gosney.

The action which respondent Secretary of State took in refusing to appoint petitioner Gosney was under and pursuant to the claimed authority vested in him under Ohio Revised Code 3501.07, a copy of which appears in the appendix herein.

Petitioner Gosney brought an action in the Ohio Supreme Court in prohibition to challenge and prevent the action of respondent Secretary of State; and the said court dismissed the action. The dismissal order appears in the appendix hereto.

Concurrently therewith the petitioner Democratic Executive Committee of Columbiana County brought a mandamus action in the Ohio Supreme Court challenging the action of respondent Secretary of State and alleging that the refusal to appoint was "illegal, unlawful, arbitrary and capricious, and is unconstitutional and void as being in violation of . . . fundamental constitutional rights as guaranteed under both the State and Federal Constitu-

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tion"; and that Ohio Revised Code 3501.07 is unconstitutional and void and violative of fundamental constitutional rights both State and Federal.

The Ohio Supreme Court in a four to three decision denied the writ of mandamus. A copy of the decision of that court appears in the appendix hereto.

Thereafter, petitioner Gosney and petitioner Democratic Executive Committee of Columbiana County, Ohio brought a declaratory judgment action in United States District Court for the Northern District of Ohio, Eastern Division under Title 42 of the U.S. Code Section 1983; Title 28 U.S. Code Section 1343(3); Title 28 U.S. Code Sections 2201 and 2202 and Title 28 U.S. Code Sections 1331 and 1343. Petitioners also invoked jurisdiction of the United States District Court under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the U. S. Constitution; under the three-judge court statute Title 28 U.S. Code Sections 2281 and 2284 being a suit in equity to challenge the constitutionality of Ohio State Statute Revised Code Section 3501.07 and the policy of respondent predicated on the authority of said statute and requiring the impanelling of a three-judge court.

Respondent, in answer filed in the United States District Court, admitted the operative facts set forth in the complaint and recited hereinafter without admitting jurisdiction and raised a number of defenses.

The respondent Ted W. Brown, Secretary of State of Ohio, then filed a motion for summary judgment. The United States District Court impanelled three judges and proceeded to rule on the motion for summary judgment. The court ruled that the decisions of the Ohio Supreme Court were res judicata as to this case and granted the motion for summary judgment. The petitioners appealed

said ruling to this Court which remanded the cause to the United States District Court for a fresh order, which order was issued. The petitioners then appealed to the United States Court of Appeals for the Sixth Circuit. The respondent filed a motion to affirm which was granted. This is an appeal of that ruling.

REASONS FOR GRANTING THE WRIT

The petitioners' basic and fundamental constitutional rights have been violated. The petitioner Don R. Gosney began serving on the Columbiana County Board of Elections in 1951 and served continuously until by letter dated February 5, 1974 the respondent Secretary of State Ted W. Brown stated that he would not reappoint the petitioner Don R. Gosney because he was on the staff of a Congressman. The petitioner Don R. Gosney was not afforded any constitutional safeguards. He was not afforded a trial or a hearing. He was not afforded an opportunity to respond to the charges levelled against him by the respondent Secretary of State Ted W. Brown.

In the case at bar Don R. Gosney's good name and reputation have been damaged and his honor and integrity are at stake. His reputation was tainted by the respondent's actions and all this took place without any right to be heard *prior* to the actions of the respondent. A statute which permits such injustice contrary to constitutional safeguards is unconstitutional.

The recent case of *Arnett v. Kennedy*, 416 U.S. 134 (1974) decided by this court discusses these safeguards. The Act which this court held constitutional in the *Arnett* case, *supra*, and the administrative procedure under it provide for numerous safeguards of due process of law for the

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removed employee, none of which are provided for by Ohio R.C. Section 3501.07.

The law is clear that the petitioners were deprived of their basic constitutional rights for which this court has jurisdiction to correct these unconstitutional and illegal acts. *Lopez v. Williams*, 372 F. Supp. 1279 (1973) states as follows:

> "The Fourteenth Amendment to the Constitution of the United States provides that no State shall:
>
> deprive any person of life, liberty, or property, without due process of law. . . .
>
> The right to procedural due process applies to a broad spectrum of important private and governmentally created interests. . . ."

It is clear that the petitioner, Don R. Gosney, is a politician and that a good reputation is of utmost importance to a politician. The respondent has given as his ground for failure to reappoint the petitioner that a conflict of interest exists. Surely this is enough to taint a person's reputation and cause him harm, especially a person whose livelihood is politics.

The United States District Court abused its discretion in failing to grant an injunction to prevent enforcement of Ohio Revised Code 3501.07, a patently unconstitutional statute.

The argument that the issues in this case have already been decided or could have been decided excluded the United States District Court from jurisdiction because of the doctrine of res judicata is not a sound legal position in this case.

CORPUS JURIS SECUNDUM describes the elements of res judicata at 50 C.J.S. Sec. 598 *Judgments*, as follows:

"The elements essential to the invoking of the doctrine of res judicata as a bar to an action have been variously stated, sometimes in the same jurisdiction, as identity of parties, of subject matter, and of cause of action; the same parties, cause of action, and thing to be recovered; . . . ."

and at 50 C.J.S. Sec. 626 *Judgments*, it is stated:

"A judgment in a suit will operate as a bar to a subsequent suit on the same cause of action if, and only if, the judgment and the proceedings leading up thereto involved, or afforded full legal opportunity for, an investigation and determination of the merits of the suit."

and at 50 C.J.S. Sec. 627:

"A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate fact or state of facts disclosed by the pleadings or evidence, or both, and on which the right of recovery depends, irrespective of formal, technical, or dilatory objections, or contentions. If the case is brought to an issue, heard on evidence submitted pro and con, and decided by the verdict of a jury or the findings of a court, the judgment rendered is on the merits."

"*Accordingly a judgment for defendant on the ground that the court is without jurisdiction is not a bar to a subsequent action.* Also a judgment denying recovery to plaintiff because of want of capacity to sue is not a bar to another action after the incapacity is removed, even though the question was determined after a trial on the merits." (emphasis added)

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and at 638:

> *"A dismissal of an action on the sole ground that the court has no jurisdiction of the subject matter of the suit or of the parties is a conclusive determination of the fact that the court lacks jurisdiction, but it is no adjudication of the merits and will not bar another action for the same cause; . . . ."* (emphasis added)

The case of *Kaufman v. Somers Board of Education*, 368 F. Supp. 28 (1973) defines in part the doctrine of res judicata. That court states as follows:

> ". . . The only requirement for a valid, final judgment to be binding on all parties as to that cause of action, is that the judgment has been on the merits, rather than on some jurisdictional or other technical ground. *Saylor v. Lindsley, supra,* 391 F.2d at 968. Cf. *Whitner v. David,* 410 F.2d 24, 31 (9th Cir. 1969). A judgment may be accorded res judicata effect in the absence of any opinion at all, so long as the pleadings reveal that no basis existed for the judgment other than a determination of the merits of the case. *Napa Valley Elec. Co. v. Railroad Comm.,* 251 U.S. 366, 371-373, 40 S.Ct. 74, 64 L.Ed. 310 (1920); *Thomas v. Consolidation Coal Co., supra,* 380 F.2d at 80-85."

The action in prohibition in the Ohio Supreme Court brought by petitioner Don R. Gosney was dismissed pursuant to a Motion to Dismiss. The matter was not decided on its merits but merely on a procedural ground. Petitioner Don R. Gosney was not a party to the Ohio Supreme Court decision in which an opinion was rendered thus such decision cannot be res judicata as to his rights.

In the case of *Cream Top Creamery v. Dean Milk Company,* 383 F.2d 358 (1967) the Federal Court of Appeals for the Sixth Circuit dealt with a case where a state

court dismissed with prejudice an action. A similar action was then filed in a Federal District Court. This court stated as follows on page 363:

> "The question, as noted by Judge Learned Hand in *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184, 188 (C.A.2), *cert. denied*, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737, is whether Congress:
>
> '[O]nly meant that the "person who shall be injured" must sue in the district court to recover damages; or whether it also meant that the district court must have unfettered power to decide the claim, regardless of the findings of any other courts, even when these were essential to the decision of actions over which their jurisdiction was unquestioned.' "

Judge Learned Hand states that the district court must have unfettered power to decide the claim, regardless of the findings of other courts.

So it is in the case at bar. The district court should have unfettered power to decide the claim of Don R. Gosney with respect to the violation of *his* constitutional rights. The Ohio Supreme Court dismissed his prohibition action on a Motion to Dismiss. The court apparently felt that there was no statutory authority for an elector to bring an action in prohibition if the Secretary of State refuses to recommend him for appointment to a Board of Elections.

Further, petitioner Don R. Gosney never had an adjudication of his rights on the merits and insofar as his cause of action against respondent Secretary of State is concerned, he stands before this court in a de novo position with the right to a declaration of his rights as distinguished from those of petitioner Democratic Executive Committee of Columbiana County.

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Thus under the above stated rules of law the prior decisions of the Ohio Supreme Court would not be res judicata as to Don R. Gosney because he brought his action for prohibition and the Ohio Supreme Court held that the respondent's Motion to Dismiss on jurisdictional grounds should be granted. The court never reached the merits of the case. Don R. Gosney was *not* a party to the action in which the court rendered an opinion.

The United States Supreme Court in the case of *Lawlor v. National Screen Service*, 349 U.S. 322 (1955) discussed additional criteria for the rule of res judicata to be applicable when it stated as follows:

> "A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. *And as already noted, a prior judgment is res judicata only as to suits involving the same cause of action. . . .*" (emphasis added)

The Ohio Supreme Court case brought by the Columbiana County Democratic Executive Committee was a mandamus action which was the statutory procedure for objecting to a decision of the Secretary of State of Ohio and really was an appeal of his ruling. The action brought by Don R. Gosney was in prohibition which was dismissed by the court and in which the court never reached the merits of the case.

It is obvious therefore that the issues involved in this appeal present a substantial federal question. Does the Constitution allow a state statute to deny a person's reappointment to a Board of Elections and taint their reputation without notice or hearing?

CONCLUSION

Based upon the reasons and authorities set forth above, it is urged that this Court grant the Petitioners Writ of Certiorari.

Respectfully submitted,

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APPENDIX

ORDER OF THE COURT OF APPEALS

(Filed January 20, 1976)

No. 75-2156

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEMOCRATIC EXECUTIVE COMMITTEE OF COLUMBIANA COUNTY, OHIO and DON R. GOSNEY,
Plaintiffs-Appellants,

v.

TED W. BROWN, Secretary of State of Ohio,
Defendant-Appellee.

ORDER

Before: MILLER, LIVELY and ENGEL, *Circuit Judges.*

Plaintiffs brought separate actions against defendant in the Ohio state courts to compel defendant to appoint plaintiff Gosney for another four-year term as a member of the Columbiana County Board of Elections. Plaintiff has been a member of that Board since 1951. Each plaintiff alleged that Ohio Revised Code § 3501.07 violated his due process rights because it allowed defendant to make decisions concerning appointments to the Board without notice or hearing. In a four to three decision, the Ohio Supreme Court, relying on *Board of Regents v. Roth,* 408 U.S. 564 (1972), held that § 3501.07 did not violate plain-

tiff Committee's due process rights. *State ex rel. Democratic Executive Committee v. Brown*, 39 Ohio St. 2d 157, 314 N.E.2d 376 (1974). Plaintiffs then brought a joint action in district court alleging a violation of 42 U.S.C. § 1983 by defendant in applying § 3501.07. A three-judge court found that plaintiff Committee's federal action was barred by the doctrine of *res judicata* because the Ohio Supreme Court's decision was final and no application for certiorari had been made to the U. S. Supreme Court. The court also concluded that plaintiff Gosney's federal action was barred because Gosney was in privity with plaintiff Committee. On appeal to the U. S. Supreme Court, that Court remanded the case with directions that a new order be entered so as to permit a timely appeal to this Court in accordance with the decision in *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975). Such timely notice of appeal has been filed with this Court.

Appellee has filed a motion to affirm the decision of the three-judge court arguing that the issues presented require no further argument and urging that this Court take notice of plaintiff Gosney's pleadings before the Ohio Supreme Court, a copy of which appellee has included with his motion to affirm.

In light of our decision in *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209 (1970), we conclude that appellee's motion to affirm should be granted. *See Preiser v. Rodriguez*, 411 U.S. 475, 497 (1973). In *Coogan*, this Court affirmed on a motion under Rule 8 the dismissal of a civil rights complaint alleging improper disbarment by the Ohio Supreme Court. As did the Democratic Committee in this case, the disbarred attorney "had an adequate remedy for review . . . by petitioning the Supreme Court of the United States for a writ of certiorari." *Id.* at 1211. The three-judge court found that the Ohio Supreme Court opinion "demonstrates that the Committee was

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therein attempting to advance the rights of plaintiff Gosney." We are of the opinion, without the necessity of taking judicial notice of Gosney's pleadings in the state court, that Gosney is unquestionably in privity with the Committee and, like the Committee is bound by the decision of the Ohio Supreme Court under the doctrine of *res judicata*.

Accordingly, it is hereby ORDERED and ADJUDGED that appellee's motion to affirm under Rule 8 of the Rules of this Court be granted.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT

(Filed July 29, 1975)

Civil Action C 74-167 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMOCRATIC EXECUTIVE COMMITTEE OF COLUMBIANA COUNTY, OHIO,
DON R. GOSNEY,
Plaintiffs,

v.

TED W. BROWN, Secretary of State of Ohio,
Defendant.

MEMORANDUM OPINION AND ORDER

Before: WEICK, *Circuit Judge*; GREEN, *District Judge*; and CONTIE, *District Judge*.

Upon consideration and pursuant to the mandate of the United States Supreme Court, the Memorandum Opinion and Order and the Judgment of this Court entered on November 26, 1974 are hereby vacated, and the following Memorandum Opinion and Order and Judgment are hereby issued by this Court.

Defendant Ted W. Brown, Secretary of State of Ohio, has moved the Court for judgment on the pleadings. As matter outside the pleadings is considered, this motion will be treated as one for summary judgment. Rule 12(c) Fed-

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eral Rules of Civil Procedure. Upon consideration and for the reasons stated below, said motion is granted.

The jurisdiction of this Court is invoked pursuant to Title 42, U.S.C. §1983; Title 28 U.S.C. §1343(3); Title 28, U.S.C. §§2201 and 2202; Title 28 U.S.C. §§1331 and 1343; the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution; and 28 U.S.C. §§2281 and 2284.

Plaintiffs seek a declaratory judgment declaring that Section 3501.07 of the Ohio Revised Code is unconstitutional, and a mandatory injunction ordering defendant Ohio Secretary of State to appoint plaintiff Don R. Gosney to the Board of Elections of Columbiana County, Ohio.

Section 3501.07 of the Revised Code of Ohio provides as follows:

> "At a meeting held not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days after a vacancy occurs in the board, the county executive committee of the major political party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint each elector, unless he has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairman of such county executive committee, with the reasons therefor, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the quali-

fications of the persons so recommended shall be on the committee making the recommendation. If no such recommendation is made, the secretary of state shall make the appointment.

"If a vacancy on the board of elections is to be filled by a minor or an intermediate political party, authorized officials of that party may within fifteen days after the vacancy occurs recommend a qualified person to the secretary of state for appointment to such vacancy."

Plaintiffs allege that, pursuant to the terms of §3501.07 of the Ohio Revised Code, plaintiff Democratic Executive Committee of Columbiana County (hereinafter Committee) recommended plaintiff Don R. Gosney (hereinafter Gosney) to defendant Secretary of State for appointment as a member of the Board of Elections of Columbiana County to succeed himself for a new four year term beginning March 1, 1974, and ending February 28, 1978. It is further alleged that defendant Secretary of State refused to accept said recommendation, and refused to appoint Gosney to the Columbiana County Board of Elections. The apparent basis for this decision was that because Gosney is employed by Congressman Wayne Hays, the Secretary of State felt that there might exist a conflict of interest, rendering Gosney not competent as a member of the Board of Elections. It is further alleged that the courts of Ohio have interpreted Section 3501.07 as vesting absolute discretion in the Secretary of State of Ohio with respect to the right to refuse to accept the recommendation of the County Executive Committee for appointing an elector to the Board of Elections, and that the Secretary of State's refusal to appoint in this case was not founded on reason or cause, but was arbitrarily exercised. Plaintiffs claim that the Secretary of State's refusal, cou-

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pled with his failure to provide a hearing at which plaintiffs could challenge this refusal, denied them due process of law.

The Committee filed with the Supreme Court of Ohio a complaint in mandamus; therein it sought to compel defendant Secretary of State to appoint Gosney to the Board of Elections of Columbiana County. The Committee argued that R.C. §3501.07 cannot vest sole and arbitrary discretion in the Secretary of State to determine competency of recommended members of the Board of Elections without also providing procedural guarantees of due process. In a *per curiam* opinion, the Supreme Court of Ohio rejected the Committee's constitutional arguments and denied the Writ of Mandamus. *State, ex rel. Democratic Executive Committee v. Brown*, 39 O.S.2d 157 (1974).

Plaintiff Gosney filed with the Supreme Court of Ohio a petition for a Writ of Prohibition against defendant Secretary of State. Upon respondent's motion to dismiss, that court sustained the motion and dismissed the case without opinion.

Defendant asserts that the doctrine of res judicata is determinative of this action. In the Supreme Court of Ohio, as here, the Committee's claim was based upon their assertion that the Secretary of State, in refusing to accept the recommendation of the Committee and appoint Mr. Gosney to the Board of Elections, acted in violation of the provisions of the Due Process clause. As it appears that the Supreme Court of Ohio had jurisdiction of the parties' persons and the subject matter of their claim, and as that court's decision became final by virtue of the Committee's failure to petition to the Supreme Court for a writ of certiorari, the judgment of the Supreme Court of Ohio is final. It is the opinion of this Court that the Committee's claims are barred by the doctrine of *res judicata*.

See *Grubb v. Public Utility Commission of Ohio*, 281 U.S. 470, 50 S.Ct. 374 (1930); *Mertes v. Mertes*, 350 F.Supp. 472 (D.Del. 1972), affd. 411 U.S. 961, 93 S.Ct. 2141 (1973); *Coogan v. Cincinnati Bar Association*, 431 F.2d 1209 (6th Cir. 1970); *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967).

Therefore, judgment must be granted to defendant Secretary of State upon the claims of plaintiff Democratic Executive Committee of Columbiana County.

Defendant also argues that the claims of plaintiff Gosney are barred by the doctrine of *res judicata*. Under Ohio civil practice an involuntary dismissal operates as an adjudication upon the merits unless the Court in its order for dismissal otherwise specifies." Thus, as the Supreme Court of Ohio dismissed Gosney's claim with no mention of prejudice, that dismissal was on the merits. 18 O.Jur.2d *Dismissal and Discontinuance*, §26. However, there is nothing before this Court to indicate the exact claims upon which Gosney relied in that action, Thus, the final judgment in *State, ex rel. Gosney v. Brown*, No. 74-148, May 1, 1974, is not demonstrated to preclude this action.

However, the rationale of the per curiam opinion in *State, ex rel. Democratic Executive Committee v. Brown, supra*, demonstrates that the Committee was therein attempting to advance the rights of plaintiff Gosney. Thus, it appears that Gosney is "a person so identified in interest with a party to former litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (1963) (footnote omitted). This Court is of the opinion that Gosney is in privity with the Committee and that therefore the decision of the Supreme Court of Ohio in *State, ex rel. Democratic*

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Executive Committee v. Brown, supra, is *res judicata* as to his claims. See *Battle v. Cherry,* 339 F.Supp. 186 (1972).

Having found that plaintiffs' claims are barred by the doctrine of *res judicata,* defendant's motion for summary judgment must be, and the same hereby is, granted.

IT IS SO ORDERED.

/s/ PAUL C. WEICK
United States Circuit Judge

/s/ BEN C. GREEN
United States District Judge

/s/ LEROY J. CONTIE, JR.
United States District Judge

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*This rule does not apply to dismissals for lack of jurisdiction or failure to join a party.

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed July 23, 1975)

Civil Action C 74-167 Y

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMOCRATIC EXECUTIVE COMMITTEE OF COLUMBIANA COUNTY, OHIO,
DON R. GOSNEY,
Plaintiffs,

vs.

TED W. BROWN, Secretary of State of Ohio,
Defendant.

JUDGMENT

Before: WEICK, *Circuit Judge;* GREEN, *District Judge;* and CONTIE, *District Judge.*

For the reasons set forth in the accompanying Memorandum Opinion and Order, this case is terminated and dismissed.

IT IS SO ORDERED.

/s/ PAUL C. WEICK
United States Circuit Judge

/s/ BEN C. GREEN
United States District Judge

/s/ LEROY J. CONTIE, JR.
United States District Judge

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ORDER OF THE SUPREME COURT OF OHIO ON MOTION TO DISMISS

(Dated May 1, 1974)

No. 74-148

THE STATE OF OHIO,
CITY OF COLUMBUS.

THE STATE OF OHIO, ex rel. DON R. GOSNEY,
Relator,

vs.

TED W. BROWN, SECRETARY OF STATE,
Respondent.

IN PROHIBITION ON MOTION TO DISMISS

This cause originated in this court on the filing of a complaint for a writ of prohibition and upon consideration of the motion to dismiss, filed by counsel for respondent, it is ordered by the court that this motion be sustained and case dismissed.

OHIO REVISED CODE

§3501.07 Party recommendations; appointment.

At a meeting held not more than sixty nor less than fifteen days before the expiration date of the term of office of a member of the board of elections, or within fifteen days after a vacancy occurs in the board, the county executive committee of the major political party entitled to the appointment may make and file a recommendation with the secretary of state for the appointment of a qualified elector. The secretary of state shall appoint such elector, unless he has reason to believe that the elector would not be a competent member of such board. In such cases the secretary of state shall so state in writing to the chairman of such county executive committee, with the reasons therefor, and such committee may either recommend another elector or may apply for a writ of mandamus to the supreme court to compel the secretary of state to appoint the elector so recommended. In such action the burden of proof to show the qualifications of the person so recommended shall be on the committee making the recommendation. If no such recommendation is made, the secretary of state shall make the appointment.

If a vacancy on the board of elections is to be filled by a minor or an intermediate political party, authorized officials of that party may within fifteen days after the vacancy occurs recommend a qualified person to the secretary of state for appointment to such vacancy.

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